

THE HONORABLE ROBERT J. BRYAN

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CIVIL ACTION NO. 3:17-cv-05806-RJB

**STATE'S RESPONSE TO GEO'S
MOTION FOR AN ORDER
DECLARING THE CONTRACT
FILING SUFFICIENT AND
ALTERNATIVELY TO FILE
LIMITED REDACTED PAGES IN
CAMERA AND UNDER SEAL**

STATE'S RESPONSE TO GEO'S MOTION
FOR AN ORDER DECLARING THE
CONTRACT FILING SUFFICIENT AND
ALTERNATIVELY TO FILE LIMITED
REDACTED PAGES IN CAMERA AND
UNDER SEAL

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I. INTRODUCTION

Defendant GEO Group, Inc. (“GEO”) asks this Court to take the extraordinary step of blocking this Court, the State, and the public from reviewing the contract (“ICE-GEO contract”) that governs GEO’s provision of detention services at the Northwest Detention Center (“NWDC”). *See generally* Mot. for an Order Declaring the Contract Filing Sufficient and Alternatively to File Limited Redacted Pages In Camera and Under Seal, ECF 20 (“Mot. to Seal”). This Court should deny GEO’s Motion to Seal and require that the ICE-GEO contract be filed in its entirety, without redactions, on the public record.

II. ARGUMENT

Redactions and requests to seal documents are governed by Local Rule 5(g), which directs that “[t]here is a strong presumption of public access to the court’s files.” The presumption exists because “[h]istorically, courts have recognized a ‘general right to inspect and copy public records and documents, including judicial records and documents.’” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). This right is justified by the interest of citizens in “keep[ing] a watchful eye on the workings of public agencies.” *Id.* at 1178. “Unless a particular court record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.” *Id.* (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)).

Although GEO has an obligation to prove that it has compelling reasons to support its motion, it fails to identify any compelling reason that supports redacting, sealing or otherwise keeping the ICE-GEO contract from public view. Further, even if the Court believes that GEO submitted compelling reasons to support its request, those reasons do not outweigh the public’s interest in disclosure of information that is being used to support GEO’s request that the State’s action be dismissed. *See generally* Mot. to Dismiss, ECF 10. The ICE-GEO contract is a source

1 of critical information about GEO's relationship to ICE and is evidence that is critical to the
 2 State's unjust enrichment claim. As such, this Court should reject Defendants' request to seal or
 3 redact the ICE-GEO contract.

4 **A. GEO Fails to Provide a Compelling Reason for Sealing the ICE-GEO Contract**

5 GEO claims that the ICE-GEO contract should be withheld from public review because
 6 it "contains numerous terms relating to pricing and payment that qualify as trade secrets[.]" Mot.
 7 to Seal at 3. However, for documents related to dispositive motions, "[a] party seeking to seal a
 8 judicial record . . . bears the burden of overcoming this strong presumption [against sealing] by
 9 meeting the 'compelling reasons' standard." *Kamakana*, 447 F.3d at 1178 (quoting *Foltz*, 331
 10 F.3d at 1135)). That is, the party must "articulate[] compelling reasons supported by specific
 11 factual findings that outweigh the general history of access and the public policies favoring
 12 disclosure, such as the public interest in understanding the judicial process." *Id.* (internal
 13 citations and quotation marks omitted). GEO has not provided factually supported, compelling
 14 reasons for its request to file a sealed record that will be relied upon in the adjudication of GEO's
 15 Motion to Dismiss.

16 Instead, GEO relies on *In re Electronic Arts, Inc. v. United States District Court for the*
 17 *Northern District of California* for the proposition that protecting trade secrets can be a
 18 compelling reason warranting the sealing of documents.¹ 298 F. Appx. 568 (9th Cir. 2011).
 19 GEO's argument fails. This is because, contrary to GEO's argument, the ICE-GEO contract does
 20 not contain information that could be deemed trade secrets. Trade secrets consist of "any
 21 formula, pattern, device or compilation of information which is used in one's business, and
 22 which gives him an opportunity to obtain an advantage over competitors who do not know or
 23 use it." *Id.* at 569. Here, the ICE-GEO contract does not contain any such proprietary, business-
 24 specific information. The contract terms that GEO seeks to keep from the State and the public's

25 ¹ *In re Electronic Arts, Inc.* is a Ninth Circuit memorandum opinion with no precedential value. Ninth
 26 Circuit Rule 36-3.

1 eyes are “numerous terms relating to pricing and payment” and nothing more specific about
 2 GEO’s business or operations. Mot.to Seal at 3.

3 The Southern District of New York was recently tasked with determining whether ICE
 4 contracts for detention services, such as the ICE-GEO contract, contained information specific
 5 enough to be deemed trade secrets for purposes of the Freedom of Information Act (“FOIA”).
 6 *Det. Watch Network v. U.S. Immigration & Customs Enf’t*, 215 F. Supp. 3d 256, 265 (S.D.N.Y.
 7 2016). It found that basic pricing information, without more, does not warrant withholding
 8 documents under FOIA’s trade secrets exemption. *Id.* at 261-66. The district court found that
 9 releasing bed-day rates, unit prices, and staffing plans would not cause competitive harm to
 10 contractors like GEO because “a competitor could not reverse engineer pricing strategies without
 11 knowledge of a large number of unascertainable variables.” *Id.* at 265. This is because the “bed-
 12 day rate . . . is a composite number, based on a number of facts, including wages and associated
 13 costs, general and administrative costs, and profits.” *Id.* Further, “[p]ricing is complex and
 14 requires contractors to make multiple assumptions and calculations.” *Id.* “Merely showing that
 15 competition exists or that contractors may face greater competition is inadequate to show that
 16 the information is confidential.” *Id.* at 264. Further, the district court found that there is a “limited
 17 competitive market for detention services” and that the ICE detention contracts “do[] not show
 18 that prices, or more importantly, profit, could be derived with the specificity needed to meet
 19 Defendants’ burden of showing competitive harm.” *Id.*

20 For the same reasons the Southern District of New York did not find that ICE detention
 21 contracts warranted withholding under FOIA, this Court should find that disclosure of the full
 22 contract is appropriate here. The information GEO seeks to withhold is not specific enough to
 23 be trade secrets or to hurt GEO’s competitiveness. Just as the *Detention Watch Network* court
 24 found, competition in the private for-profit detention industry is limited. Simply put, basic
 25 pricing information is insufficient to meet GEO’s burden of showing a compelling reason to
 26 withhold contract information. Although GEO may not want to release a full copy of the ICE-

1 GEO contract to the public, such a disclosure does not constitute a compelling reason to warrant
 2 filing any portions of the contract under seal as such information will not release trade secrets
 3 nor will it likely cause competitive harms to GEO.² Instead, the release would allow this Court,
 4 the State, and the public to know the rules that govern GEO's operation of NWDC, including
 5 the amount that ICE pays GEO for its services.

6 **B. GEO Fails to Support Redacting Pricing Information**

7 GEO also argues that because ICE responded to a FOIA request by releasing the ICE-
 8 GEO contract with redactions, this Court must now accept an incomplete redacted version of the
 9 contract or review the contract in camera. Mot. to Seal at 3. However, the law does not support
 10 this contention: "FOIA is a statutory scheme directed to regulating the public access to
 11 documents held by the federal government By contrast, the public's right and need to access
 12 court documents is grounded on principles related to the public's right and need to access court
 13 proceedings." *See Kamakana*, 447 F.3d at 1185. As the policies governing disclosure under
 14 FOIA and access to court documents and proceedings are different, the fact that a document was
 15 withheld or redacted for FOIA purposes is not dispositive for determining whether a court should
 16 withhold information from the court record.

17 Further, even under FOIA, the redactions made to the disclosed contract are unjustified.
 18 *See Det. Watch Network*, 215 F. Supp. 3d at 266. The *Detention Watch Network* court squarely
 19 held, in the context of immigration detention contracts, that "[d]isclosure of pricing information,
 20 in particular, is consistent with the purposes of FOIA." *Id.* The *Detention Watch Network* court
 21 reasoned that contract prices "[a]re not mere offer or bid prices; they are prices that the
 22 government agreed to pay, and that it did pay, for specified services that it purchased from the

23
 24 ² GEO also argues that "releasing confidential pricing models to the public will damage competition among
 25 ICE's potential contracting partners, resulting in higher costs to the government, and thus to taxpayers." Mot. to
 26 Seal at 3. This argument is speculative at best. There is no guarantee that releasing basic contractual information
 will trigger an increase to overall detention costs. Further, even if prices increase, there is no reason to think that
 ICE or the American taxpayer will have to shoulder those financial burdens. Increases in costs can be absorbed in
 a multitude of ways including by GEO providing those services at a lower profit margin.

company.” *Id.* (quoting *McDonnell Douglas Corp. v. U.S. Dep’t of Air Force*, 375 F.3d 1182, 1195 (D.C. Cir. 2004) (Garland, J., dissenting)); *see also Canadian Commercial Corp. v. Dep’t of Air Force*, 514 F.3d 37, 43 (D.C. Cir. 2008) (Tatel, J., concurring); *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep’t of Justice*, 697 F.3d 184, 194 (2d Cir. 2012)). And, ultimately, the *Detention Watch Network* court found that “[d]isclosure of such information permits the public to evaluate whether the government is receiving value for taxpayer funds, or whether the contract is instead an instance of waste, fraud, or abuse of the public trust Such disclosure thus comes within the core purpose of FOIA: to inform citizens about what their government is up to.” *Det. Watch Network*, 215 F. Supp. 3d at 266 (alterations in original omitted) (quoting *McDonnell Douglas Corp.*, 375 F.3d at 1195 (Garland, J., dissenting)).

Further, redactions of court documents should be limited to instances where the party seeks to “protect sensitive information . . . that the court does not need to consider.” Local Rule 5(g)(1)(B). In this instance, the information that GEO seeks to hide from the Court and the State is information that is critical to understanding the relationship GEO has to ICE and the obligations that ICE imposed on GEO regarding the operation of NWDC. It is true that at this point in the litigation, resolving GEO’s Motion to Dismiss, “turn[s] almost entirely on questions of law.” Mot. to Seal at 4. However, the terms of the ICE-GEO contract include facts that this Court needs to adjudicate GEO’s Motion to Dismiss. Further, the State’s unjust enrichment claim requires this Court and the State to review a complete, unredacted ICE-GEO contract, as the contract includes financial information critical to determining whether GEO has been unjustly enriched and the scope of any such enrichment. *See Pierce Cty. v. Washington*, 185 P.3d 594, 619 (Wash. Ct. App. 2008) (relying on contract terms to determine liability for unjust enrichment). It is certain that the information that GEO seeks to redact is information that this Court will need to consider. As such Local Rule 5(g)(1)(B) does not support GEO’s request for submitting a redacted contract.

III. CONCLUSION

For the foregoing reasons, this Court should deny GEO's request that the Court either rely on a redacted version of the contract that withholds critical information regarding the State's lawsuit or allow GEO to file unredacted pages of the ICE-GEO contract under seal.

Dated this 27th of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the District Court of Western Washington, using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 27th day of November, 2017.

/s/ La Rond Baker
LA ROND BAKER